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In the
Supreme Court of the United States
OCTOBER TERM, 1991

SHIRLEY CLARK,

Petitioner,

v.

HAAS GROUP, INC.,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

REPLY IN SUPPORT OF CERTIORARI

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The Petition showed that, under the ruling below, in any case between an employer and an employee, all possible employment-related claims must be litigated or they are lost, and that the parties cannot exclude any of the claims from a settlement, even if they plainly intend to do so. Respondent argues that the questions presented in the Petition are not squarely raised because the opinion below was highly fact-bound, and because petitioner supposedly relied on facts not in the record to show that the parties intended the settlement of petitioner's earlier lawsuit not to waive the claims in this action. Neither argument is correct, and indeed both are contradicted by respondent's own briefs in this Court.

1. **The Tenth Circuit Decided as a Matter of Law That All Claims Relating to an Employment Relationship Arise Out of the Same Transaction, and So Must Be Litigated Together.**

The Opposition begins, at 2-6, by describing the holding below as "very narrow, applicable only to the facts of this case." *Id.* 4. The principal flaw in this argument is that it is flatly contrary to the arguments in the last part of the Opposition, at 13-18. In that part of its Opposition, respondent attempts to explain why the court below ruled correctly, and in this regard, describes -- accurately, we believe -- the rule of decision enunciated below in sweeping terms.

Thus, on the one hand, in arguing that the first question is not squarely presented, respondent asserts that the Tenth Circuit's holding is fact-bound, and rests on a careful analysis of a large number of facts, in accordance with the multi-factor test of the Restatement (Second) of Judgments. Opp. 5-6. But in arguing that the decision was correct, respondent defends the Tenth Circuit's holding that "in some circumstances" those factors need not be considered in determining whether claims arise out of the same transaction, Opp. 15-16, citing the Tenth Circuit's earlier ruling to the same effect in *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329 (10th Cir. 1988). *Petromanagement*, in fact, squarely held that "all claims that arise out of a given legal relationship, such as a contractual relationship, arise out of the same 'transaction'" and hence must be raised and litigated or are deemed waived. Opp. 15. The Opposition continues by repeating the argument it made to the Tenth Circuit, and again correctly characterizes the sweeping opinion of the Tenth Circuit: "the employment relationship between Petitioner and [respondent] was a single 'transaction.' . . . Therefore, no further analysis was necessary to determine that the claims asserted in *Clark II* were barred by Petitioner's failure to assert them in *Clark I*, ..." Opp. 15-16.

Respondent does assert that, even though the Tenth Circuit's analysis did not require consideration of the individual factors of the Restatement, the court below did consider those

factors. Opp. 16, 18. Respondent does not cite the pages of the opinion below where this consideration is alleged to appear, and for good reason -- it never took place. To the extent that the court below even mentioned those factors, it deemed them all satisfied by the fact that the claims all arose out of a single employment relationship. Pet. App. 9a. Even **respondent's** version of the Tenth Circuit's consideration of the factors shows that the analysis of each factor begins and ends with the fact that the claim is made by an employee against an employer. Opp. 16-17. Thus, the claims are related in time and space because they arose out of events at the place of employment, and during the time of the employment. *Id.* 16. The claims form a convenient trial unit "since *all* claims arose out of the employment relationship," *id.* 17, and the parties would reasonably have expected the claims in the two cases to be tried together because they were both brought by a former employee against her employer. *Id.*

Respondent's effort to show the absence of a conflict between this case and those cited in the Petition fails because the attempted distinction rests in large part on the proposition, which we have refuted above, that the Tenth Circuit's opinion is fact-bound. Opp. 11-12. However, respondent also attempts to distinguish three of the cases. It argues that *Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989), is distinguishable because the claims in *Wu II* did not arise until after *Wu I*, because the employment relationship did not terminate, and because there was an additional party in *Wu II*. Opp. 8-9. Although all these facts may be correct, they were not the basis for the Eleventh Circuit's res judicata holding that the claim of Ms. Wu in the second action against her employer was not barred by her loss of her first suit against the same employer. 863 F.2d at 1549. Similarly, *Brantley v. Surles*, 718 F.2d 1354 (5th Cir. 1983), is said to be distinguishable because the concurring opinion rested on the fact that the ruling on the first claim was "primarily" jurisdictional, and not res judicata for that reason. Opp. 10. Although that is an accurate description of the concurring opinion, that was not the basis for the majority opinion, which rested on the grounds stated in the Petition at 8.

Finally, *May v. Morganelli-Heumann & Assoc.*, 618 F.2d 1363 (9th Cir. 1980), is said to be distinguishable because the claims

were brought in two different courts, Opp. 10, and because the opinion "does not even address res judicata." *Id.* But respondent does not explain why the same court/different court has any more relevance to the analysis than the fact that May was male but Clark is female. *May* rested on two propositions: that one who has been hired to do certain work has the choice of suing over some, but not all, claims related to the contract of hire, and that the filing and settlement of the first suit on the contract do not preclude a later suit on other claims arising out of the same relationship. The Ninth Circuit's holding that May had the legal ability to exclude some claims from the preclusive effects of suit over the same contract of hire is flatly inconsistent with the Tenth Circuit's holding here, that all such claims necessarily arise out of the same transaction and must be brought together. Although the *May* court spoke in terms of election of remedies doctrine, the case is recognized as a leading example of judicial use of election language to achieve sound claim preclusion results. 18 Wright, Miller & Cooper, *Fed Prac. & Proc.: Civil* § 4476, at 777-778 (1981).[1]

In addition to attempting to deny the existence of a circuit conflict, respondent tries to downplay the reasons advanced in the Petition for deeming this a highly significant issue of federal law. As we demonstrated, Pet. 15-18, the decision below will encourage employers and employees to increase both the number of claims brought against each other and the intensity of their litigation, to the disadvantage of judicial dockets and amicable employment relations. Respondent concedes that these arguments are "interesting," but argues that "they are unfounded based upon the fact-bound decision of the Tenth Circuit." Opp. 13. It further contends that the decision below has additional benefits because it prevents employees from sandbagging employers by settling one set of claims without even letting the employer know that other suits are contemplated. *Id.*

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[1] Respondent's assertion that "the defendants in the two actions . . . were completely different," Opp. 10, if relevant at all, is correct only in the most technical sense, because the parties in interest were the same. The first action was brought against Jones, who had hired May. The second was brought against the executor of Jones' estate, plus the firm that Jones had hired after May and to whom Jones had given May's work product, allegedly without payment to May.

But it is respondent who ignores the record in this case. As the Petition showed at 2-3, and as acknowledged by the Opposition at 5, at the time *Clark I* was settled, petitioner had already filed her EEOC charge, thus plainly putting respondent on notice of her discrimination claims. *Clark I* was then settled, with the settlement agreement limited to overtime and minimum wage claims. To be sure, respondent claims that there is no evidence in the record on that issue, but that representation is flatly incorrect, as we now show.

2. **The Issue of Intent to Limit the Scope of the Settlement of the First Action is Squarely Presented Here, Because Evidence of the Parties' Intent Was Introduced in the District Court.**

In its original Opposition, respondent advanced only one objection to the second Question Presented -- it claimed that the question of whether the parties intended to limit the scope of the settlement of the first lawsuit is not even properly before this Court, because "petitioner simply failed to introduce the evidence in the District Court," Opp. 7, but only tried to present it on a petition for rehearing after the Tenth Circuit ruled. *See also id.* at 11 ("there was no evidence properly before the District Court or the Tenth Circuit regarding the parties' intent with respect to the settlement agreement that led to the dismissal of *Clark I*"), 12 ("Petitioner provided no evidence to the district court of her intent regarding the settlement agreement.").

The Petition asserted that petitioner had introduced an affidavit from her counsel in *Clark I* in the district court on the issue of intent. Pet. 3. Although respondents initially accused petitioner of basing her Statement of Facts on materials outside the record, Opp. 1, respondent now acknowledges that the Roseman affidavit, which is appended to the Supplemental Memorandum in Opposition ("Supp. Opp.") at App. 1 to App. 3, and which sets forth the recollections of petitioner's trial counsel in *Clark I* on the issue of intent, was in fact filed in the district court, in opposition to respondent's motion for summary judgment.

In its Supplemental Opposition, respondent now argues that this affidavit was based on hearsay, was therefore insufficient to defeat summary judgment under Rule 56(e), and so was properly ignored by the court of appeals. There are three flaws in this objection.

First, the affidavit is not based on hearsay. It is an account of the course of the settlement negotiations by petitioner's then-counsel, Mr. Roseman, and it is based on his personal knowledge of those negotiations, as well as the agreement itself, which Mr. Roseman read before executing his affidavit. Mr. Roseman's descriptions of statements by respondent's counsel, Mr. Purvis, are not hearsay, as respondent contends, Supp. Opp. 3, because they are not offered to prove the truth of Mr. Purvis' statements. Indeed, if the recollections of the lawyers who negotiate a settlement agreement are not proper evidence to determine whether certain subjects were considered, or waived, then courts will never be able to review the negotiating history to decide the scope of res judicata. That is precisely the rule for which respondent contended below, but which other courts of appeals have rejected, and the propriety of which is at the heart of the second question presented.[2]

Second, when the Roseman affidavit was filed, respondent did not object on Rule 56(e) grounds, or indeed on any other grounds, when petitioner could have remedied any evidentiary defects. Instead, respondent submitted a counter affidavit from its president that discussed the settlement agreement, provided respondent's understanding of its significance, and offered the agreement to the court if it desired to review it. Its reply brief on summary judgment argued that, for res judicata purposes, it didn't matter what claims the parties did or did not intend to release or

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[2] It is nothing short of outrageous for respondent to rely on the fact that Roseman did not attach the Settlement Agreement to his affidavit. Supp. Opp. 2. As the Petition noted, at 4 n.2, that agreement contained a confidentiality clause that respondent refused to waive. In its reply brief on summary judgment in the district court, respondent offered to present the Agreement for the court's inspection if the court so requested. Because it denied summary judgment, the court apparently found it unnecessary to take respondent up on its offer.

resolve, and that any such intent to limit the effect of the agreement was relevant only to collateral estoppel, not res judicata. District Court Reply Br. at 4. Nor, indeed, did respondent object to the Roseman affidavit in the court of appeals. Accordingly, any possible defects in the Roseman affidavit have been waived, 10A Wright, Miller & Kane, *Fed. Prac. & Proc.: Civil* § 2738, at 507-509 (2d ed. 1983); *Scharf v. United States Attorney General*, 597 F.2d 1240, 1243 (9th Cir. 1979), and the validity of resppondent's argument below, which the court of appeals accepted, is squarely presented.

Third, whether or not the court of appeals might have been justified in deciding that the Roseman affidavit does not meet Rule 56(e) standards, the fact remains that it did not rule on that basis. Indeed, under respondent's theory of the case, it was unnecessary for that court even to consider the sufficiency of the affidavit because the intent of the parties is irrelevant. Respondent apparently wishes, in retrospect, that the court of appeals had not accepted its legal analysis and had not ignored the parties' intent, but there can be no doubt the propriety of the refusal of the court of appeals to consider the issue of intent is squarely presented on this record.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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